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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

44 LIQUORMART, INC. and
PEOPLES SUPER LIQUOR STORES, INC.,

Petitioners,

—v.—

STATE OF RHODE ISLAND, and
RHODE ISLAND LIQUOR STORES ASSOCIATION,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF RHODE ISLAND IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Rhode Island is its statewide affiliate. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*, in cases challenging governmental actions that threaten First Amendment rights. Because this case raises fundamental questions about the ability of government to suppress truthful and non-misleading information about a lawful product, *amici* respectfully submit this brief urging reversal of the decision below.

STATEMENT OF THE CASE

Two Rhode Island statutes are challenged in this appeal. R.I. Gen. Laws §3-8-7 prohibits manufacturers, wholesalers, shippers, and retailers from advertising the price of any alcoholic beverage, with the single exception of signs or tags attached to "merchandise for sale within the licensed premises." R.I. Gen. Laws §3-8-8.1 bars media in Rhode Island from publishing any liquor price advertising or otherwise "mak[ing] reference to the price of any alcoholic beverages." The statutes thus prevent out-of-state wholesalers, retailers, manufacturers or distributors from communicating price information through Rhode Island media outlets, and shield higher-cost Rhode Island liquor stores from competition by depriving consumers of any but on-site information about

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

comparative prices.[2] Rhode Island defends the laws as attempts to prevent price wars and thereby reduce excessive liquor consumption.

In the district court, plaintiffs' experts testified that there was no empirical evidence that price advertising affects alcohol consumption. Rhode Island, for example, has a comparatively high level of alcohol consumption, while many states that allow price advertising have lower drinking rates. *44 Liquormart, Inc. v. Racine*, 829 F.Supp. at 546-48.[3] One of the plaintiffs' experts explained that,

> because price advertising is only one part of the total advertising phenomenon, there is no reason to believe that a change in that factor alone would have much of an impact on levels of consumption.

Id. at 546. The other plaintiffs' expert concurred that price advertising had no known effect on consumption or temperance. *Id.* at 547. The district court credited this testimony, while finding that the government's expert was not persuasive and presented no relevant testimony on the effect of price advertising.[4]

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[2] One in-state and one out-of-state corporation joined as plaintiffs to challenge the statutes. The Rhode Island Liquor Stores Association intervened as a defendant to represent the interests of small retail liquor stores. *44 Liquormart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993), *rev'd sub nom. 44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S.Ct. 1821 (1995).

[3] By contrast, there was some evidence that "overall alcohol advertising [*i.e.*, not price advertising] has a slight effect on alcohol consumption." 829 F.Supp. at 546.

[4] This defense expert discussed an international study comparing countries that allow liquor advertising and those that do not. The countries (continued...)

The district court found that Rhode Island had not met its burden of justifying the price advertising ban under the second and third parts of the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), for evaluating the constitutionality of burdens on commercial speech.[5] As to the second *Central Hudson* factor, the government did not show that Rhode Island's statutes directly advance the governmental interest asserted, *44 Liquormart*, 829 F.Supp. at 551; and as to the third, Rhode Island did not show that the price ban was "not more extensive than is necessary to serve that interest." *Id.*[6]

The district court rejected arguments that the Twenty-first Amendment permitted states to infringe constitutionally

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[4] (...continued)
that banned broadcast advertising of alcohol were found to have lower liver cirrhosis, mortality, and motor vehicle fatality rates. The district court found that the study did not consider numerous variables that might account for these correlations; there was not even any indication whether the motor vehicle death rates were alcohol-related. *Id.* at 548-49. Moreover, the study did not relate to price advertising but to alcohol advertising generally.

[5] In *Florida Bar v. Went For It, Inc.*, __ U.S. __, 63 U.S.L.W. 4644, 4646 (June 21, 1995), the Court described the *Central Hudson* test as having "three related prongs"; previously, the Court had referred to a four-part test. Throughout this brief, we have adopted the "three-part" language of the *Florida Bar* opinion.

[6] The court recognized that the third *Central Hudson* factor has been modified somewhat to require a reasonable "fit" between the regulation and achievement of the government's goal. *Id.* at 554. *See Edenfield v. Fane*, 507 U.S. __, __, 113 S.Ct. 1792, 1798 (1993)(laws restricting commercial speech "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny"). *See also Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. at 4648 ("Of course, we do not equate this fact with the less rigorous obstacles of rational basis review").

protected expression pursuant to their liquor licensing powers, or otherwise required "a shift in both the level and allocation of the traditional burden of proof" in commercial speech cases. *Id.* The court also distinguished two circuit court decisions that had upheld wholesale bans on liquor advertising, *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); and *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir. 1983)(*en banc*), *cert. denied*, 467 U.S. 1259 (1984), and rejected the state's argument that this Court's summary affirmance in *Queensgate Investment Co. v. Liquor Control Comm'n*, 459 U.S. 807 (1982), mandated approval of Rhode Island's price advertising laws. *44 Liquormart*, 829 F.Supp. at 553.

The First Circuit reversed. The appellate court accepted the government's and intervenors' argument for a more lenient standard of review based on the state's Twenty-first Amendment powers. *44 Liquormart, Inc. v. State of Rhode Island*, 39 F.3d at 7. Although purporting to follow simply a relaxed version of the *Central Hudson* test, the First Circuit essentially reduced the level of scrutiny to a generalized standard of "reasonableness"[7] and, ignoring the district court's factual findings,[8] found the statutes "reasonably" related to the goal of temperance. The First Circuit did note a significant Commerce Clause concern with the laws' discrimination against out-of-state sellers, observing that the retailer/intervenors' argument that "the statute protects the small vendor from the giants . . . might not be a lawful use of the Twenty-First Amendment." *Id.* at 8. The court of

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[7] The court also relied on *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S 328, 342 (1986), for its use of a "reasonableness" test. 39 F.3d at 7-8.

[8] The court of appeals implied that the expert testimony went "both ways." *See* 39 F.3d at 7.

appeals deemed the Commerce Clause argument waived, however, and so did not resolve this issue. *Id.* at 9.

This Court granted *certiorari* on May 1, 1995.

SUMMARY OF ARGUMENT

The public's First Amendment interest in truthful price information does not depend on whether the information is packaged as "commercial" or "noncommercial" speech. Under our system of free expression, government should not be in the paternalistic business of attempting to control citizens' behavior by depriving them of accurate information. Thus, under this Court's well-established precedents, there is no basis for applying a relaxed standard of First Amendment scrutiny to Rhode Island's ban on truthful price advertising.

In particular, the First Circuit erred by relying on *Posadas de Puerto Rico*, 478 U.S. 328, to justify diminished First Amendment protection simply because the state seeks to discourage use of the product being advertised, or even has the power to outlaw it entirely. As this Court has strongly suggested in its most recent reference to *Posadas*, the state's "greater" power to ban an activity does *not* include the "lesser" power to silence ideas and information about it. This case presents the Court with an opportunity, therefore, expressly to disavow the overly broad language in *Posadas* that has brought unnecessary confusion to this area of the law.

Similarly, the Twenty-first Amendment does not provide a basis for diminished First Amendment scrutiny in the context of this case. The Twenty-first Amendment permits states to outlaw alcohol or regulate its distribution to an extent that otherwise might offend the Commerce Clause. It does not trump or diminish other constitutional provisions,

particularly the individual freedoms found in the Bill of Rights.

Finally, Rhode Island has not met its burden of justifying the price advertising ban under this Court's *Central Hudson* test for suppression of commercial speech. Its interest in controlling citizens' behavior by denying them truthful information is not only not substantial, it is illegitimate. Moreover, Rhode Island has not shown that the ban directly advances its stated goal of promoting temperance. *A fortiori*, it has not shown that the goal is served by methods that are reasonably tailored to achieve the desired ends. Indeed, the only goal demonstrably accomplished by the ban is to protect high-cost Rhode Island retailers from price competition.

ARGUMENT

I. LAWS THAT PATERNALISTICALLY DENY CITIZENS TRUTHFUL PRICE INFORMATION IN ORDER TO INFLUENCE OR CONTROL BEHAVIOR VIOLATE THE FIRST AMENDMENT

A. The First Amendment Interest In Receiving Truthful Information Is The Same Regardless Of Whether The Information Is Supplied In The Context Of Commercial Or Noncommercial Speech

Although this case involves advertising, the public interest in receiving truthful product information transcends the sometimes too rigid division between commercial and noncommercial speech. In *Cincinnati v. Discovery Network, Inc.*, 507 U.S. __, __, 113 S.Ct. 1505, 1511 (1993), this Court recognized the limitations of the commercial/noncom-

mercial distinction, and thus rejected Cincinnati's argument that the advertising fliers it sought to restrict had "only a low value." Cincinnati's attempt to distinguish between newspapers and commercial fliers, said the Court,

> attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

Id. As the Court noted, the newspapers that Cincinnati favored in its newsrack distribution scheme and the fliers that it disfavored had much content in common. Furthermore, consumers had a similar interest in receiving both types of material. *Id.* at 1511-12 & n.17. Under the circumstances, the Court held, and Justice Blackmun emphasized in a separate concurring opinion, the distinction between commercial and noncommercial speech is not enough, by itself, to deprive consumers of truthful and non-misleading information. *Id.* at 1515 n.21 and 1517 (Blackmun, J., concurring).[9]

The seminal decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), explains why the First Amendment obstacles to government suppression of truthful price information (in that case, about prescription drugs) should not vary depending on whether the speaker's motivation is or is not commercial. Certainly, said the Court, the consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763.[10]

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[9] *Cf. Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71-72 (1983) (the "distinction between commercial and noncommercial speech" does not justify the suppression of speech based on offensiveness).

[10] Indeed, even though the state has a strong interest in seeing that drugs

(continued...)

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

The Court reiterated this concern with the free flow of truthful information in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-65 (1977)(rejecting the state's "paternalistic" approach that suppresses information in an effort to control consumer choices); *Central Hudson*, 447 U.S. at 561-62 ("[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)("[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'")(quoting *Virginia Pharmacy*, 425 U.S. at 764). In *Rubin v. Coors Brewing Co.*, __ U.S. __, __, 115 S.Ct. 1585, 1589 (1995), the Court recently reaffirmed the importance of "'the free flow of commercial information'" and repeated the observation of *Virginia Pharmacy* that the citizen's interest in such information "'may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'"[11]

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[10] (...continued)
are not abused, accurate price information can make the difference between health and sickness to many Americans. *Id.* at 763-64.

[11] *Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644, which upheld a (continued...)

Indeed, the *Virginia Pharmacy* principle is fundamental to the First Amendment, and has been cited in the context of noncommercial speech as well. For example, *United States v. National Treasury Employees Union*, 513 U.S. __, __, 115 S.Ct. 1003, 1014 (1995), in striking down a statute creating disincentives to government employees' expression, noted that the law also significantly burdened the public's right to read and hear. In *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989), a ban on primary endorsements was held to hamstrings voters; the Court noted that such a "highly paternalistic approach" to what people may hear is generally suspect. *See also City of Ladue v. Gilleo*, 512 U.S. __, __, 114 S.Ct. 2038, 2042 (1994)(town may not achieve its goal by restricting free flow of information)(citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977)).

The real First Amendment stake in cases involving truthful advertising is thus the public's right to receive information.[12] That right is the same regardless of whether

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[11] (...continued)
30-day ban on lawyer advertising directed at accident victims and their families, does not undermine the validity of this general principle. In *Florida Bar*, the Court stressed the state's historic role in regulating the legal profession. As Justice O'Connor explained in her majority opinion, "[t]here is an obvious difference between situations in which the Government acts in its own interests, or on behalf of entities it regulates, and situations in which the Government is motivated primarily by paternalism." *Id.* at 4648 n.2.

[12] *See generally Board of Education, Island Trees School Dist. v. Pico*, 457 U.S. 853, 866-67 (1982), *id.* at 911-13 & nn.6 & 7 (Rehnquist, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965)(Brennan, J., concurring); Note, "Constitutional Protection of Commercial Speech," 82 Colum.L.Rev. 720, 730-36 (1982).

the information is reported in newspaper articles, consumer surveys, or commercial advertisements. Indeed, Rhode Island's statutory scheme attacks the right to receive information regardless of whether it comes in a commercial or noncommercial package: §3-8-8.1 flatly bars the media from "mak[ing] reference to the price of any alcoholic beverage." Such a ban on truthful product information cannot be justified under the First Amendment.[13]

In *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585, Justice Stevens explained why the usual justifications for affording diminished First Amendment protection to commercial speech do not apply to truthful, non-misleading information. The alcohol content information involved in *Coors* was the same whether it appeared on a product label or in the report of a nonprofit consumer protection group. *Id.* at 1595 (Stevens, J., concurring). Depriving people of the information did not serve any of the purposes that ordinarily justify relaxed constitutional scrutiny of commercial speech (*e.g.*, potential for undue influence or deception). *Id.* at 1596. In short,

> [a]ny "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark

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[13] To the extent that §3-8-8.1 bars noncommercial references "to the price of any alcoholic beverage," it is unconstitutional under the traditional strict scrutiny test for government regulation that targets speech based on its content. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991).

> for what the government believes to be their own good.

Id. at 1597 (citations omitted).

In short, a government decision to suppress truthful information in order to control the behavior of citizens is highly suspect under the First Amendment. Paternalistic suppression of ideas or information because of the presumed "dangerous" effect that such expression may have on human behavior is a constitutional anathema in the context of non-commercial speech, *see, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Whitney v. California*, 274 U.S. 357, 375-77 (1927)(Brandeis, J., concurring), and has been condemned in commercial speech cases as well. As Justice Blackmun explained in *Central Hudson*,

> I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

447 U.S. at 574-75 (Blackmun, J., concurring).

A strong argument can be made, therefore, that traditional First Amendment strict scrutiny should apply whenever the government deprives citizens of truthful information in order to influence or control their choices as consumers. Indeed, the Court in *Central Hudson* noted the weighty First Amendment arguments in favor of strictly

scrutinizing bans of truthful commercial information, even though it ultimately settled on a less exacting standard because of the "'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Id.* at 562 (citation omitted). Because Rhode Island's ban is invalid even under the *Central Hudson* test generally applicable to commercial speech, *see* §III, *infra*, the Court need not revisit this question of heightened scrutiny in this case. Surely, however, there should be no dilution of the *Central Hudson* standard.

B. A State's Interest In Discouraging Harmful Activities, Including Its Power To Ban Such Activities, Does Not Justify The Suppression Of Truthful Information

Rhode Island argues that *Posadas de Puerto Rico*, 478 U.S. 328, and *United States v. Edge Broadcasting Co.*, 509 U.S. __, 113 S.Ct. 2696 (1993), permit states greater leeway in suppressing truthful advertising where the product or service is socially harmful and/or might constitutionally be banned. But this Court has already rejected an expansive interpretation of *Posadas* and *Edge* that would allow the paternalistic suppression of accurate information. *Rubin v. Coors*, 115 S.Ct. at 1589-90 n.2. Indeed, the Court in *Coors* limited *Posadas* to its primary holding that Puerto Rico's ban on casino advertising satisfied the *Central Hudson* test.

To the extent that it survives *Coors*, the broader language of *Posadas* should now be disavowed. Specifically, the Court should expressly reject the troublesome and idiosyncratic suggestion in *Posadas* that so long as a state may ban a disfavored activity entirely, then it is equally free to adopt the "less restrictive" option of imposing limits on speech that might promote the activity -- the so-called

"greater power includes the lesser" rationale. 478 U.S. at 346-47. As explained more fully below, this proposition is fundamentally incompatible with basic First Amendment principles and has contributed little to the development of First Amendment law. Read in context, moreover, the statement in *Posadas* on which Rhode Island so heavily relies was merely a response to the plaintiffs' argument that prior commercial speech cases[14] precluded Puerto Rico's ban on casino advertising. The Court distinguished the earlier decisions on the ground that they involved constitutionally protected activities, whereas gambling had no constitutional status and indeed could be banned.[15] In *Edge Broadcasting*, which also involved gambling, the Court explicitly declined to address the state's "greater includes the lesser" argument, and simply found that the statutes passed muster under the *Central Hudson* test. 113 S.Ct. at 2703.

A few examples from recent cases illustrate the fallacy of the "greater includes the lesser" reasoning, as applied to speech. In *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, the Court invalidated a statute requiring that all proceeds earned from writings describing a crime, and written by persons accused or convicted of that crime, be turned over to a victims compensation board. Although New York could have imposed the "greater" burden of channeling *all* proceeds from crime to victim compensation, it could not constitutionally choose the "lesser" alternative of requisitioning only profits from First Amendment activity. *Id.* at 119-20. This principle, condemning content-based burdens on speech, is reflected in numerous other cases. *E.g.*, *Arkansas Writers' Project v.*

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[14] *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977), and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[15] *See Posadas*, 478 U.S. at 345; *Rubin v. Coors*, 115 S.Ct. at 1589-90 n.2.

Ragland, 481 U.S. 221, 230 (1987)(state may tax commercial activities in general but may not single out publications for taxation on the basis of content); *Carey v. Brown*, 447 U.S. 455 (1980)(state may prohibit residential picketing in interests of privacy but may not single out nonlabor picketing). *Cf. Ladue v. Gilleo*, 114 S.Ct. at 2043 ("an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people'")(quoting *Bellotti*, 435 U.S. at 785-86).

In some contexts, such as nonpublic fora, content-based restrictions on speech are permitted but viewpoint discrimination is not. Thus, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 450 U.S. 37, 46 (1983), and *NAACP v. Cornelius*, 473 U.S. 788, 806 (1985), the Court upheld exclusions based on subject matter but only because they were viewpoint neutral. The greater power -- to exclude speech on certain subjects -- decidedly did not include the lesser -- to exclude only some speech on those subjects, depending on its viewpoint. Indeed, *R.A.V. v. City of St. Paul*, 505 U.S. __, 112 S.Ct. 2538 (1992), established that even a state's "greater power" to prohibit certain categories of speech entirely (such as fighting words or obscenity) does not include the "lesser power" to ban only some speech within those categories based on its viewpoint.

Similarly here, a state may choose to regulate liquor consumption in a variety of ways, undoubtedly including some regulation of advertising. But it may not suppress truthful information in an effort to deter citizens from engaging in legal conduct of which the state may disapprove.

If anything, the governmental interest in preventing harmful conduct was stronger in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), than in the so-called "vice" cases involving liquor or gambling. The dangers that

Willingboro sought to prevent -- racial segregation and blockbusting -- are not only socially harmful and repugnant, but are potential violations of the civil rights laws. *See id.* at 94-95. Yet Justice Marshall, writing for the Court, explained that government could not constitutionally seek to avert these dangers by suppressing "the free flow of truthful information." *Id.* at 95.

> If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:
>
> "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Id. at 96-97 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

In a system that values free expression, creating a lenient First Amendment standard simply because the state seeks to deter conduct it deems harmful is unjustifiably paternalistic and weighs the free speech scales too heavily in favor of suppression. Under *Central Hudson*, the state must at the outset "assert a substantial interest to be achieved" by its restriction on commercial speech. 447 U.S. at 564. Here, Rhode Island's interest in reducing alcohol consumption is admittedly substantial, though its interest in doing so by denying the public truthful information is illegitimate. *See* §III, *infra*. Certainly, it is not necessary or wise to give Rhode Island three bites at the apple by factoring the "socially harmful" nature of the conduct into the equation again by eviscerating the second and third parts of the *Central Hudson* test.

II. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT GOVERNMENT SUPPRESSION OF TRUTHFUL ALCOHOL PRICE INFORMATION OR JUSTIFY ANY WEAKENING OF FIRST AMENDMENT SCRUTINY

The Twenty-first Amendment created a limited exception to the Commerce Clause, permitting the states to ban or regulate the distribution of alcohol within their borders. *Hostetter v. Idelwild Liquor Corp.*, 377 U.S. 324, 330-32 (1964); *Ziffrin v. Reeves*, 308 U.S. 132, 138-39 (1939). Even with respect to the Commerce Clause, however, a state's authority is far from absolute, *see Hostetter*, 377 U.S. at 332; *Healy v. The Beer Institute*, 491 U.S. 324, 341-42 (1989), and the Amendment gives the states no power to encroach on other constitutional provisions. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 711-16 (Twenty-first Amendment does not permit state ban on liquor advertising that violates Supremacy Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982)(state "may not exercise

its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause"); *California Retail Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-10 (1980)(Twenty-first Amendment does not immunize state pricing scheme from antitrust liability); *Craig v. Boren*, 429 U.S. 190, 204-09 (1976)(state may not rely on Twenty-first Amendment to justify sex discrimination in regulation of liquor sales); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(Twenty-first Amendment does not excuse violation of due process in posting name of alleged excessive drinker). As the Court made clear in *Craig*:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked, "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned" . . . . Any departures from this historical view have been limited and sporadic.

429 U.S. at 206 (quoting Paul Brest, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 258 (1975)); *see also Capital Cities v. Crisp*, 467 U.S. at 712 ("our prior cases have made clear that the Amendment does not license the States to ignore their obligations under other provisions of the Constitution").

Rhode Island relies upon *California v. LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981)(*per curiam*), to argue that the Twenty-first Amendment gives it broad authority to censor speech related to the consumption of alcohol. The focus in

LaRue, however, was almost entirely on conduct, not expression: the "gross sexuality" that the record amply showed had repeatedly occurred when liquor mixed with sexual entertainment. 409 U.S. at 118. The *per curiam* decision in *Bellanca* did contain broad language asserting that:

> Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment.

452 U.S. at 718. But this language was not necessary to the result in *Bellanca*, which like *LaRue* essentially upheld a regulation of sexual conduct on licensed premises.

The *LaRue* and *Bellanca* line of cases[16] address a narrow and unique police problem that arises when sexual entertainment is combined with alcohol consumption. They cannot be understood to authorize state regulation of First Amendment-protected expression simply because the speech takes place in saloons: political discussions, for example, even if mixing liquor and politics sometimes proves incendiary.[17] Still less do they justify a ban on truthful information, which has no element of conduct, sexual or otherwise, and does not even occur on licensed premises. Certainly *LaRue* and *Bellanca* cannot be stretched to authorize general encroachments on speech simply because liquor

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[16] *See also City of Newport v. Iacobucci*, 479 U.S. 92 (1986); *id.* at 103 (Stevens, J., dissenting)("the Court is quite wrong in proceeding as if the Twenty-first Amendment repealed not only the Eighteenth Amendment, but some undefined portion of the First Amendment as well").

[17] *Cf.* James Joyce, ULYSSES 394-449 (Bodley Head ed. 1960)(scene at Barney Kiernan's pub in which "the citizen," inebriated, attacks Bloom after an argument about Irish history, patriotism, and anti-Semitism).

consumption is somehow involved. The Court should repudiate any language in these cases that suggests otherwise.[18]

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. __, 111 S.Ct. 2456 (1991), a plurality of this Court explained that nude dancing, absent any serious artistic element, has only "marginal" First Amendment protection, *id.* at 2460,[19] and that states may regulate it pursuant to their general police power. There was no need for special reference to state power under the Twenty-first Amendment. Justice Souter's concurrence, the narrowest ground on which *Barnes* was decided, would permit regulation of nude entertainment because of its presumed adverse secondary effects, *id.* at 2468. Given *Barnes*, there is no necessity to stretch the Twenty-first Amendment beyond its purposes or language simply to establish government's acknowledged power to regulate public displays of sexual conduct. Accordingly, the Court should reiterate the holdings of *Craig* and *Crisp* and clarify that the Twenty-first Amendment does not authorize otherwise impermissible encroachments on First Amendment rights.

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[18] It follows that lower court decisions relying on *LaRue* and *Bellanca* to uphold liquor advertising bans should also be repudiated. See *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), and *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir. 1983)(*en banc*), *cert. denied*, 467 U.S. 1259 (1984). The better reasoned case is *Michigan Beer & Wine Wholesalers Ass'n v. Michigan Liquor Control Comm'n*, 370 N.W.2d 328, 335 (Mich.Ct.App.1985): it distinguishes *LaRue* and *Bellanca* because they simply upheld regulation of liquor distribution, not "suppression of constitutionally protected expression"; and found Michigan's ban on price advertising unjustified because there was no known correlation between consumption and prices. 370 N.W.2d at 336.

[19] "[T]he barest minimum," as the Court implied as long ago as *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

III. RHODE ISLAND'S BAN ON TRUTHFUL PRICE ADVERTISING IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST

Under *Central Hudson* and its progeny, the government bears the burden of proving both that an infringement of commercial speech directly advances a substantial state interest, and that it is no more extensive than necessary to serve that interest. 447 U.S. at 564; *Rubin v. Coors*, 115 S.Ct. at 1798; *Edenfield v. Fane*, 113 S.Ct. at 1798. This is not a strict "least restrictive means" test, but it is also far from toothless: it requires the state to *prove* that the means chosen directly advance and are "narrowly tailored to achieve the desired objective." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989).[20] The regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose," and the state's burden "is not satisfied by mere speculation or conjecture." *Edenfield*, 113 S.Ct. at 1800 (citation omitted); *Coors*, 115 S.Ct. at 1592.

Rhode Island manifestly has not met its burden here. First, although reducing alcohol consumption is surely a substantial state interest, controlling behavior by suppressing speech is not. Because paternalistic efforts to manipulate citizen choices through censorship are so antithetical to First Amendment principles, *see* §IA, *supra*, Rhode Island's interest here is not only not substantial, it is illegitimate.

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[20] For the reasons stated in §II, *supra*, and contrary to the Rhode Island Supreme Court's decisions in *Rhode Island Liquor Stores Ass'n v. The Evening Call*, 497 A.2d 331 (R.I. 1985), and *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985), the burden of proof does not shift simply because the subject of the advertising is liquor.

Even assuming that Rhode Island may escape this impediment by raising the level of abstraction and describing its interest as simply deterring excessive alcohol use, it has not satisfied the second and third prongs of the *Central Hudson* test. The district court found that the state presented no evidence that the price advertising ban directly advanced Rhode Island's interest or, indeed, had any effect on alcohol consumption. *Compare Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. at 4646-47. And plaintiffs' evidence established precisely the contrary.[21] The only apparent effect of the ban is to protect high-priced in-state retailers from price competition. As Justice Murray pointed out, dissenting in one of the two Rhode Island Supreme Court decisions upholding the ban,

> The underlying motives of this case have nothing to do with the "promotion of temperance" among Rhode Island citizens, but rather with the promotion of price ignorance. The [Rhode Island Liquor Stores Association] seeks to retain its members' market share by withholding price information from Rhode Island citizens.

Rhode Island Liquor Stores Ass'n v. The Evening Call, 497 A.2d at 342 (Murray, J., dissenting).

Because Rhode Island had not shown that its price advertising ban directly advances its stated goal, *a fortiori* it has not met its burden of proving the ban is narrowly tailored. The court of appeals implicitly acknowledged that

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[21] The state suggests that liquor consumption, although higher in Rhode Island than in many states without price advertising bans, might be higher still without the ban. This is mere speculation and hardly amounts to affirmative evidence that the ban directly advances the goal of temperance in a narrowly tailored manner.

Rhode Island had not satisfied the second and third prongs of *Central Hudson*, and only reversed because it believed that a much looser test applied where the state was censoring speech in order to discourage "harmful" activity.

Rhode Island has other, constitutionally nonproblematic options available if it seriously wishes to discourage excessive liquor consumption. It may embark on a health and safety campaign of the type that was so effective in the 1960s, in the context of cigarette advertising, that it persuaded the tobacco industry to abandon broadcast commercials entirely. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 587-90 (D.D.C. 1971)(three-judge court) (Wright, J. dissenting), *sum. aff'd*, 405 U.S. 1000 (1972) (explaining how tobacco industry lobbied for ban on broadcast advertising after FCC rulings requiring equal access for anti-smoking ads succeeded in dramatically reducing tobacco sales). It may impose heavy sales taxes on liquor or otherwise make the cost of consumption high through pricing schemes that are sufficiently state-dominated to be immunized from antitrust law.[22] Here, as in *Coors*, "the availability of these options, all of which could advance the government's asserted interest in a manner less intrusive to [plaintiff's] First Amendment rights, indicates that [the challenged statute] is more extensive than necessary." 115 S.Ct. at 1593-94. What Rhode Island may not do under the First Amendment is suppress truthful price information because it considers the information dangerous. *Cf. Speiser v. Randall*, 357 U.S. 513, 519 (1958)(restrictions on government benefits may not be "aimed at the suppression of dangerous ideas"); *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983)(same).

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[22] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)(state's liquor pricing scheme violated Sherman Act because it delegated decisionmaking to private industry).

CONCLUSION

The First Amendment condemns suppression of truthful information in the interests of controlling citizen behavior. A state that wishes to discourage harmful activities like excessive drinking has many options open to it that would directly advance its goal without engaging in the speculative and constitutionally dubious practice of censoring speech. The judgment of the court of appeals should therefore be reversed.

Respectfully submitted,

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